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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK
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No. 08-

IN THE

Supreme Court of the United States

COREY ALAN BROCKMAN,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Circuit in this case affirmed a criminal sentence requiring that petitioner's federal sentence run consecutively with a state sentence that had yet to be imposed. That ruling perpetuates a direct and acknowledged circuit conflict concerning a federal district court's authority under 18 U.S.C. § 3584(a)—the statute governing consecutive and concurrent sentences—to order a federal sentence to be served consecutively with a future state sentence. Four circuits have held that district courts have authority to impose such sentences, while four circuits have held that district courts lack such authority. The Government has acknowledged that conflict and conceded that district courts lack the authority to impose such a sentence.

The question presented is:

Whether a district court has authority to order a defendant's federal sentence to be served consecutively with a state sentence that has not yet been imposed.

PARTIES TO THE PROCEEDING

Petitioner is Corey Alan Brockman, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Corey Alan Brockman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but available at 2009 WL 405868 and reprinted at App. 4a-5a. The district court issued no opinion; its judgment is reprinted at App. 1a-3a.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2009. App. 6a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced at App. 15a-18a.

INTRODUCTION

This petition raises the question whether a district court has authority to order a federal sentence to be served consecutively with a state sentence that has yet to be imposed. This Court has been holding two petitions presenting that issue since the February 20, 2009 conference, *see Goodgion v. United States*, No. 08-5920 (filed Aug. 20, 2008); *Garcia v. United States*, No. 08-6756 (filed Oct. 6, 2008), and two other petitions on the issue are also pending before the Court. *Smith v. United States*, No. 08-8118 (petition filed Jan. 3, 2009; opposition filed April 29,

2009); *Brent v. United States*, No. 08-9319 (petition filed Mar. 16, 2009; response due May 20, 2009).

In its responses to those petitions, the Government has acknowledged that the courts of appeals are divided, 4-4, over this question. And after remaining silent on the merits over the course of many years, the Government has finally conceded in these responses that sentences like the one imposed by the district court in this case are unlawful.

Even after confessing error, however, the Government has continued its longstanding practice of opposing this Court's review of the issue. The Government has argued that the unlawful sentencing practice has not significantly harmed any of the petitioners. And it has argued that the issue may be reconsidered by the circuits that have approved the practice.

Neither argument withstands analysis in this case. The unlawful sentence in this case demonstrably harms petitioner. Absent the consecutive sentencing order, petitioner could obtain credit on his federal sentence for the time he serves on his state sentence, reducing his total period of incarceration by two years. The illegal sentencing order categorically bars petitioner from obtaining that credit and thus condemns him to two additional years of incarceration. And even after the Government confessed error, the Fifth Circuit denied en banc review of the question. Having only recently denied en banc consideration, there is no realistic possibility that the Fifth Circuit will correct this indefensible sentencing practice. The Court should therefore grant the petition and reverse the decision below.

STATEMENT OF THE CASE

1. On December 15, 2007, local law enforcement officers received a phone call from petitioner's grandmother alerting them that petitioner, a convicted felon, had taken her husband's deer rifle and pawned it at a pawn shop. Petitioner's Presentence Report ("PSR") ¶ 12. After the officers investigated the matter, they located petitioner and informed him that, by pawning the rifle, he had been in possession of a firearm in violation of federal and state law. *Id.* ¶ 17.

On February 13, 2008, the Government filed a three-count indictment against petitioner, alleging, *inter alia*, that he had violated 18 U.S.C. § 922(g)(1) by possessing a firearm as a convicted felon. PSR ¶ 1. Pursuant to a written plea agreement, petitioner pleaded guilty to that charge. *Id.* ¶ 3.

2. Petitioner's PSR noted that charges were pending against petitioner in the District Attorney's Office for Taylor County, Texas, for Forgery, Illegal Dumping, and Assault, and that there was a pending case in Taylor County against petitioner for Criminal Mischief. PSR ¶ 77-78. The PSR advised the district court that it could "exercise discretion" in determining whether to make petitioner's federal sentence consecutive with "sentences anticipated, but not yet imposed, in separate state court proceedings." *Id.* ¶ 76. Petitioner filed a written objection to the court imposing a sentence "consecutive to any as-yet-unimposed sentence." PSR Addendum.

At sentencing, petitioner renewed this objection. App. 10a-11a. The Government responded that "*Brown* [*United States v. Brown*, 920 F.2d 1212 (5th

Cir.) (per curiam), *cert. denied*, 500 U.S. 925 (1991)] settles the law in the Fifth Circuit." App. 11a. The district court concluded that the objection "should be overruled for the reasons as set forth in the [PSR] addendum." App. 11a; *see* PSR Addendum (stating that "Fifth Circuit law" authorized such a consecutive sentence). The district court sentenced petitioner to 24 months of imprisonment and 3 years of supervised release. And it further ordered that petitioner's federal sentence "be served consecutive with any sentence imposed in the case presently pending against [him] in the 350th District Court of Taylor County, Texas, as well as consecutive with any future charges and case that might be filed against [him] and sentence to be imposed against [him] if [he were to be] found guilty of those charges that are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas." App. 12a.

3. A state court subsequently sentenced petitioner on the pending Taylor County charges, ordering him to serve one year and eight months for the offense of criminal mischief and four years for aggravated assault. The state court ordered the criminal mischief sentence to run "concurrently" (without specifying whether that included petitioner's federal sentence) and did not state whether the four-year assault term should be served concurrently or consecutively. *See* Judgment of Conviction, *Texas v. Brockman*, No. 08223D (Taylor County Nov. 6, 2008) (mischief); Judgment of Conviction, *Texas v. Brockman*, No. 8823D (Taylor County Nov. 6, 2008) (assault). That order has the effect, under state law,

of requiring petitioner's sentence to run concurrently with previously imposed sentences.[1]

Petitioner's projected release date from the state penitentiary is January 25, 2012. *See* Tex. Dep't Crim. Justice Offender Information Detail, Corey Brockman, *available at* http://168.51.178.33/webapp/TDCJ/InmateDetails.jsp?sidnumber=06300347.

4. Petitioner appealed his federal sentence and argued that the district court had exceeded its statutory authority in ordering that his federal sentence run consecutively with state sentences that had yet to be imposed. *See* Pet'r C.A. Br. 2-4. Petitioner acknowledged that Fifth Circuit precedent foreclosed his claims but sought summary adjudication to preserve the issue for review in this Court. *Id.* The court of appeals summarily affirmed. App. 4a-5a.

REASONS FOR GRANTING THE PETITION

In this case, the Fifth Circuit held that a district court has authority to order that a federal sentence run consecutively with a yet-to-be-imposed state sentence. That holding perpetuates an entrenched, 4-4 circuit conflict that the Government has acknowledged, and it affirms a sentencing practice that the Government has conceded is unlawful. The argu-

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[1] Under Texas law, all sentences run concurrently unless "cumulated in the proper manner." Michael J. McCormick et al., 7A Tex. Prac., Criminal Forms and Trial Manual § 77.16 (11th ed. 2009). That "proper manner" requires the sentencing court to designate, among other things, "the convicting courts, the offenses upon which convictions were had, the dates of the sentences [to which the imposed sentence is to be cumulative], and the terms of years assessed." *Young v. State*, 579 S.W.2d 10, 11 (Tex. Crim. App. 1979).

ments the Government has made against review in other cases presenting this issue provide no reason to deny review in this case. This Court should therefore grant the petition and stop this unlawful practice.

I. THE COURT OF APPEALS' DECISION PERPETUATES AN ACKNOWLEDGED CONFLICT AMONG THE CIRCUITS AND AFFIRMS A SENTENCING PRACTICE THE GOVERNMENT ADMITS IS UNLAWFUL

As the Government has acknowledged, the courts of appeals are divided, 4-4, on the question whether a federal district court has authority to order a federal sentence to be served consecutively to a state sentence that has yet to be imposed. *See, e.g.*, Br. in Opp., *Smith v. United States*, No. 08-8118, at 21-22 (filed Apr. 29, 2009) ("*Smith* Opp.") (describing split). The Second, Sixth, Seventh, and Ninth Circuits have all held that a district court lacks the authority to issue such a sentence. *See United States v. Donoso*, 521 F.3d 144, 149 (2d Cir. 2008) (per curiam); *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 737 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492-93 (9th Cir. 1991). In contrast, the Fifth, Eighth, Tenth, and Eleventh Circuits have held that a district court has such authority. *See Brown*, 920 F.2d at 1216; *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 59 (10th Cir.), *cert. denied*, 516 U.S. 926 (1995); *United States v. Ballard*, 6 F.3d 1502, 1507 (11th Cir. 1993).

The Government has conceded, moreover, that "Section 3584(a) does not confer th[e] authority" to "direct that a sentence be served consecutively to a yet-to-be-imposed state sentence." *Smith* Opp. at 20-21. Indeed, the text of 18 U.S.C. § 3584(a) makes clear that a district court is authorized to impose a consecutive sentence in two, and only two, circumstances: (1) "[i]f multiple terms of imprisonment are imposed on a defendant *at the same time*," or (2) "if a term of imprisonment is imposed on a defendant who is *already subject* to an undischarged term of imprisonment." 18 U.S.C. § 3584(a) (emphasis added). As the Government has acknowledged, to hold that a district court also has authority to make a federal sentence consecutive with a state sentence that has not yet been imposed would render a large portion of Section 3584(a) surplusage. *Smith* Opp. at 22. Furthermore, as the Government has conceded, a district court "cannot logically" "consider the sentencing factors set out in 18 U.S.C. 3553(a) in making a decision whether to impose a term of imprisonment consecutively or concurrently to another term" when "one of [those] sentences has not yet been determined." *Smith* Opp. at 23. Thus, the sentence imposed by the district court in this case is indisputably unlawful.

II. THE GOVERNMENT'S ARGUMENTS OPPOSING REVIEW PROVIDE NO BASIS FOR DENYING THE PETITION IN THIS CASE.

For many years, the sentencing practice at issue here has been prevalent in a number of circuits, including the Fifth Circuit. And for many years, the

Government opposed review of the issue without taking any position on the merits of the practice.

Having finally decided to confess error on the issue, there was reason to hope that the Government would join with a petitioner to urge the Court to end this blatantly unlawful sentencing practice. Instead, the Government has persisted in opposing review.

The Government has offered two reasons for doing so. First, it has argued that the unlawful sentencing practice does not have any significant impact on criminal defendants. *Smith* Opp. at 23, 28; *see* Br. in Opp., *Cortes-Beltran v. United States*, No. 08-8243, at 21 (filed Apr. 13, 2009) ("*Cortes-Beltran* Opp.") (same). And second, it has argued that the circuits that currently sanction illegal consecutive sentences might reconsider their view in light of the Government's confession of error. Neither argument provides any basis for denying review in this case.

A. Petitioner's Unlawful Sentence Forecloses A Two-Year Reduction In His Period Of Incarceration.

Petitioner has an undeniably concrete interest in obtaining a reversal of his unlawful consecutive sentence. That sentence subjects petitioner to an additional two years in prison that he might avoid under a lawful sentence.

Petitioner is currently serving a four-year state sentence in a state facility. Under settled BOP policy, petitioner may request that the BOP issue a "nunc pro tunc" designation under which his time in state detention would count toward his two-year federal sentence. Federal Bureau of Prisons, U.S. Dep't

of Justice, Program Statement No. 5160.05, *Designation of State Institution for Service of Federal Sentence* § 9(b)(4) (Jan. 16, 2003) ("BOP Program Statement"). In petitioner's case, that would mean that the BOP could deem his entire two-year federal sentence to have been served during his period of state incarceration.

The district court's consecutive sentence order, however, categorically bars the BOP from exercising its discretion to grant a request for nunc pro tunc designation. The BOP has expressly stated that it "will not allow a concurrent designation" where, as here, "the sentencing court has already made" the sentence "consecutive." BOP Program Statement 5160.05 § 9(b)(4)(f). The district court's unlawful consecutive sentence therefore precludes petitioner from obtaining a nunc pro tunc designation that would reduce his period of incarceration by two years.

The Government has argued that persons in petitioner's position have no ground for complaint, because, even absent the court's order, the BOP would have discretion to deny a nunc pro tunc request, and, in exercising that discretion, would solicit and consider the district court's view. *Smith* Opp. at 29; *see* BOP Program Statement 5160.05 § 9(b)(4)(c) (in making nunc pro tunc determination, the BOP "will send a letter to the sentencing court . . . inquiring whether the court has any objections" to designation).

There is an enormous difference, however, between a district court order that requires petitioner to serve two additional years of imprisonment, and a

district court order that allows the BOP to exercise its discretion to eliminate that additional two years of imprisonment entirely. In one case, the district court's order is controlling, and there is no possibility that the total time of incarceration will be reduced; in the other case, the district court's view is simply one factor among others that the BOP considers, and there remains a concrete opportunity for petitioner to reduce his period of incarceration by two years. Indeed, the Government freely admits that it is bound to consider a broad range of factors in the latter situation, and that it may not treat the district court's views as "dispositive." *Smith* Opp. at 26; *see Cortes-Beltran* Opp. at 26 (citing *Trowell v. Beeler*, 135 F. App'x 590, 594-96 (4th Cir. 2005), as "holding that BOP must consider all factors set out in 18 U.S.C. 3621(b), not just the sentencing court's views").

There is also an immense difference between how a district court determines whether to make a federal sentence consecutive with a state sentence before the state sentence is imposed and how a district court decides what to recommend to the BOP after a state sentence has been imposed. As the Government observed in explaining why Section 3584 cannot be read to authorize sentences like petitioner's, a district court cannot intelligently decide "whether to impose a term of imprisonment consecutively or concurrently to another term" without "consideration of the total length of incarceration." *Smith* Opp. at 23. There is therefore no reason to believe that a district court that issues a consecutive sentencing order before knowing what the state sentence will be would make that same recommendation once it finds out

the length of the state sentence. In petitioner's case, for example, the fact that the district court issued a consecutive sentencing order when it had no idea whether petitioner would serve any time at all on his state charges says nothing about what recommendation the district court will make after learning that a state court has sentenced petitioner to four years of imprisonment.

In the end, regardless of what the district court recommends, it is the BOP's responsibility to consider all the relevant circumstances and decide whether petitioner should receive credit for his period of state incarceration. Under petitioner's current, unlawful sentence, however, the BOP is categorically foreclosed from making that judgment; it has no choice other than to carry out the district court's consecutive sentence order. BOP Program Statement 5160.05 § 9(b)(4)(f). This Court's reversal of the order will eliminate that unlawful impediment to the BOP's exercise of authority and provide petitioner with a realistic opportunity to serve two less years of imprisonment.

B. The Fifth Circuit Has Refused To Reconsider Its Precedent.

The Government's argument that review should be denied because the Fifth Circuit may reverse its precedent is equally without merit. The is no realistic prospect that the Fifth Circuit will correct the practice of imposing federal sentences that are consecutive with state sentences that are not yet imposed.

After the Government confessed error on the issue, the Fifth Circuit, in *United States v. Garcia-Espinoza*, No. 08-10775, asked whether it should grant hearing en banc to overrule its precedent. *See* U.S. Br., *Garcia-Espinoza*, No. 08-7775, at 1 (filed Mar. 4, 2009) (describing December 18, 2008 order). But the Fifth Circuit ultimately denied hearing en banc on the issue, with no judge in regular active service requesting a poll. App. 7a-8a (order rejecting Garcia-Espinoza's motion for hearing en banc). The Fifth Circuit subsequently affirmed the sentence in *Garcia-Espinoza*, with only one judge urging that the issue be resolved en banc. *United States v. Garcia-Espinoza*, No. 08-10775, slip. op. at 3 (5th Cir. May 15, 2009) (Owen, J., concurring).

The Government asserts that the Fifth Circuit may be looking for a more appropriate vehicle than *Garcia-Espinoza* to revisit its precedent. *Smith* Opp. at 28. But the experience in the Fifth Circuit provides no support for the Government's speculation. Since requesting and receiving the petition for en banc review in *Garcia-Espinoza*, the Fifth Circuit has affirmed *seven* district court orders requiring that federal sentences be served consecutively with state sentences that had yet to be imposed. *See* App. 4a-5a (petitioner's case); *United States v. Farris*, Nos. 08-10277, 08-10279, 2009 WL 464221 (5th Cir. Feb. 23, 2009) (per curiam); *United States v. Scott*, No. 08-10846, 2009 WL 415256 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Valenciano-Espinoza*, No. 08-10970, 2009 WL 413592 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Maden*, No. 08-11031, 2009 WL 413577 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Garcia*, No. 08-

50161, 2009 WL 411518 (5th Cir. Feb. 18, 2009) (per curiam); *United States v. Jochum*, No. 08-10847, 2009 WL 405865 (5th Cir. Feb. 18, 2009) (per curiam). That is hardly consistent with what a circuit would do if it were looking for an appropriate vehicle to overrule its precedent.

The Government's suggestion that the Court should wait for the Fifth Circuit to solve this problem has a particularly hollow ring because the Government does not believe that an appropriate vehicle for resolving the issue can ever exist. When a person begins by serving his federal sentence, and the state sentence has yet to be imposed, the Government invariably argues that an illegal consecutive sentence has no "concrete practical effect" because the state court may "make the state sentence effectively concurrent" by shortening the state term or suspending it completely. Br. in Opp., *Martinez-Guerrero v. United States*, No. 07-1362, at 8-9 (filed Aug. 27, 2008). And when a person begins by serving his state sentence, the Government invariably argues that an illegal consecutive sentence has "no practical effect" because the "BOP retains the discretion to deny [a] request [for nunc pro tunc designation] even when the federal court judgment is silent as to the order of the sentences." Response of the U.S. to Appellant's Pet. for Reh'g En Banc, *United States v. Lowe*, No. 08-2304, at 6 (8th Cir. Apr. 1, 2009). Not surprisingly, while holding out the possibility that the Fifth Circuit may one day solve this problem, the Government does not suggest that it will ever urge the Fifth Circuit to do so.

The time to end this practice is now, and this is the case in which to do so. The arguments advanced by the Government against review of previous cases carry no weight here: petitioner has properly preserved the issue for plenary review, and the harm caused by his unlawful sentence is demonstrable. This Court should grant the petition and resolve this conflict once and for all.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2009

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA,	Case Number: 1:08-CR-009
Plaintiff,	USM No. 37527-177
v.	Filed Aug. 27, 2008
COREY ALAN BROCKMAN,	
Defendant.	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, COREY ALAN BROCKMAN, was represented by David Sloan.

On motion of the United States, the court has dismissed the remaining counts of the indictment as to this defendant.

The defendant pleaded guilty to count 1 of the indictment filed on 02/13/2008. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense
18 U.S.C. § 922(g)(1) [Penalty found in 18 U.S.C. § 924(a)(2)	Convicted Felon in Possession of a Firearm
Date of Offense	**Count Number**
12/12/2007	1

As pronounced on 08/27/2008, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 27th day of August, 2008.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months with this term of imprisonment to be served consecutive with any sentence imposed in Case No. 8223D, 350th District Court, Taylor County, Texas. Additionally, this term of imprisonment shall run consecutive with any sentence that may be imposed in the charges of Forgery, Illegal Dumping, and Assault which are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas, and as to any charges that may be filed with a Taylor County Court, Taylor County, Texas, on these offenses.

The defendant shall remain in custody pending service of sentence.

The Court recommends that the defendant be placed at FCI Big Spring, Texas.

RETURN

I have executed this judgment as follows:

_____

Defendant delivered on ____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10882
Conference Calendar

FILED
February 18, 2009
Charles R. Fulbridge III, Clerk

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

COREY ALAN BROCKMAN

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 1:08-CR-9-ALL

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appealing the Judgment in a Criminal Case, Cory Alan Brockman presents arguments that he concedes are foreclosed by *United States v. Brown*, 920 F.2d 1212, 1216-17 (5th Cir. 1991), *abrogated on other grounds by United States v. Candia*, 454 F.3d 468, 472-73 (5th Cir. 2006), which held that a district court may order a term of imprisonment to run consecutively with an unimposed state sentence. The appellant's motion for summary disposition is GRANTED, and the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10882
Conference Calendar

D.C. Docket No. 1:08-CR-9-ALL

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

FILED
February 18, 2009
Charles R. Fulbridge III, Clerk

COREY ALAN BROCKMAN

Defendant-Appellant

Appeal from the United States District Court for the Northern District of Texas at Abilene

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file. It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE:

A True Copy
Attest
Clerk, U.S. Court of Appeals, Fifth Circuit
By: _____
Deputy
New Orleans, Louisiana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-10775

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ROBERTO GARCIA-ESPINOZA

Defendant-Appellant

U.S. COURT OF APPEALS
FILED
APR 13 2009
Charles R. Fulbridge III, Clerk

.....

Appeal from the United Stated District Court for the Northern District of Texas at Lubbock

.....

ON MOTION FOR HEARING EN BANC

Before KING, DENNIS, and OWEN, Circuit Judges.

(✓) No member of the panel nor judge in regular active service on the court having requested that the court be polled on Hearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Motion for Hearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the

judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Motion for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Priscilla A. Owen
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

COREY ALAN BROCKMAN,

Defendant.

No. 1:08-CR-009

LUBBOCK, TEXAS

AUGUST 27, 2008

**SENTENCING HEARING
BEFORE THE HONORABLE
SAM R. CUMMINGS,
UNITED STATES DISTRICT JUDGE**

APPEARANCES

FOR THE GOVERNMENT:	United States Attorney's Office 1205 Texas Avenue, Suite 700 Lubbock, Texas 79401 By: C. Richard Baker
FOR THE DEFENDANT:	Federal Public Defender's Office 1205 Texas Avenue, Suite 506

Lubbock, Texas 79401
By: David E. Sloan

OFFICIAL COURT REPORTER: Mechelle Daniel
1205 Texas Avenue
Lubbock, Texas 79401
(806) 744-7667

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY; TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

* * * * * *

THE COURT: The Court calls for sentencing Cause Number CR1-08-009, United States of America vs. Corey Brockman.

MR. BAKER: Ready for the United States, Your Honor.

MR. SLOAN: The defendant is present and ready, Your Honor.

THE COURT: The file reflects that a presentence report has been prepared. Mr. Brockman, have you gone over that report with your lawyer?

THE DEFENDANT: Yes.

THE COURT: The file also reflects that the government has filed a statement adopting the matters set forth in the presentence report. The defendant has filed an objection to the report. Counsel, if you wish, you may address that objection.

MR. SLOAN: Your Honor, the objection that I

filed has to do with the stacking of time to as-yet-unimposed state sentences. This is an objection the Court has seen before. I'm told by Appellate that I'm obligated to raise it at this point, and so I would raise it and stand on the written motion--or stand on the written objection.

THE COURT: All right. Government's response?

MR. BAKER: Brown settles the law in the Fifth Circuit, Your Honor.

THE COURT: The Court, having considered the objection, is of the opinion it should be overruled for the reasons as set forth in the addendum. The Court then will adopt as the Court's findings those matters set forth in the presentence report and the addendum, not only as it relates to the background data and information, but also the analysis made under the sentencing guidelines. Does the government have any evidence or argument?

MR. BAKER: No, Your Honor, other than to move, pursuant to the plea agreement, to dismiss Counts 2 and 3.

THE COURT: That motion is granted. We will proceed in reference to Count 1. Does the defense have any evidence or further argument?

MR. SLOAN: Judge, I would ask for a nonbinding placement recommendation to Big Spring, and nothing else.

THE COURT: Mr. Brockman, you have the right to address the Court this morning prior to the imposition of sentence. You are not required to say

anything, should that be your choice, but the law does afford you that right and opportunity. Is there anything which you wish to state to the Court this morning?

THE DEFENDANT: No, sir.

THE COURT: Mr. Brockman, you pleaded guilty to Count 1 of the indictment charging you with being a convicted felon in possession of a firearm. You having pleaded guilty to that charge, I found you guilty, and I am now adjudging you guilty of that offense.

Having adjudged you guilty, I am now going to impose the following sentence:

First, I'm ordering that you pay a special assessment of $100.

Next, I'm ordering that you be committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 24 months, with this term of imprisonment to be served consecutive with any sentence imposed in the case presently pending against you in the 350th District Court of Taylor County, Texas, as well as consecutive with any future charges and case that might be filed against you and sentence to be imposed against you if you are found guilty of those charges that are currently pending in the Taylor County District Attorney's Office, Taylor County, Texas.

I will recommend that you be placed at FCI Big Spring.

Upon your release from incarceration, I'm

ordering that you serve a 3-year term of supervised release. You will get a copy of the judgment so you will know what the conditions of supervision are. There are some standard conditions, as well as special conditions.

Some of those special conditions include the following:

First, you shall participate in a program approved by the United States Probation Office for the treatment of narcotic, drug or alcohol dependency.

Next, you shall participate in mental health treatment service programs as directed by the United States Probation Office.

Next, you shall cooperate in the collection of any DNA as directed by the United States Probation Office.

I will now state on the record the specific reasons for imposing the sentence I have just imposed.

As to the term of incarceration, I have imposed a term of 24 months. I believe this sentence does adequately address the sentencing objectives of punishment and deterrence.

No fine is assessed for the reason I do not believe the defendant has sufficient assets with which to pay a fine.

The supervised release is imposed for the reason believe the defendant will need this amount of supervision to see that he re-assimilates himself

back in society, that he obtains suitable employment, and that he maintains a law-abiding lifestyle.

The special assessment is imposed because the law mandates that it be.

Now, Mr. Brockman, you have the right to appeal as authorized by law or as stated in your plea agreement. Should you choose to appeal, you must file your notice of appeal within 10 days from today. If you file that notice of appeal, you may also file a motion with the Court seeking permission to appeal at no cost to yourself, but rather at the cost of the government. Should you file that motion, I will take it under advisement and rule on it just as soon as I can.

You may stand aside.

(END OF HEARING)

* * * * * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

_____ Date: October 2, 2008

Michelle Daniel
Official Court Reporter

APPENDIX E

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 3584. Multiple Sentences of Imprisonment

(a) Imposition of concurrent or consecutive terms.--If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

(b) Factors to be considered in imposing concurrent or consecutive terms.--The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

(c) Treatment of multiple sentence as an aggregate.--Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term

of imprisonment.

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18 U.S.C. § 3553. Imposition of a Sentence

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range

established for··

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines··

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement··

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to

such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.